TABLE OF CONTENTS

	Page
Table of Authorities	ii
Question Presented	1
Statement of the Case	2
The Status of Respondents as Defendants-Intervenors in Lower Court Proceedings	2
Participation of Respondents in District Court Interlocutory Remedy Proceedings	4
Participation of Respondents in Appellate Proceedings	6
The Stillborn Third Theory Proposed to Justify a Suggested Compulsory Transfer and Transportation of Respondent Children to Detroit Public Schools	9
Participation of Respondents in Proceedings Before the District Court Relating Back to the Complaint Commencing this Action and Now Concerning a Fourth Theory Proposed to Justify Compulsory Transfer and Transportation of Respondent Children to Detroit Public Schools	10
Argument	30
Conclusion	33

TABLE OF AUTHORITIES

	Page
Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)	32
Berdie v. Kurtz, 88 F.2d 158 (10 Cir.1937)	8
Bradley v. Milliken, 468 F.2d 902 (1972)	7
Bradley v. Milliken, slip opinion December 8, 1972, vacated January 16, 1973	9
Bradley v. Richmond School Board, 51 F.R.D. 139 (1970)	4
Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) (Brown II)	8, 31
Heine v. Board of Levee Commissioners, 86 U.S. 655 (1873)	8
In Re Bowman, 24 F. Supp. 381 (S.D.Cal.1938)	8
Meyer v. City of Eufaula, Oklahoma, 132 F.2d 648 (10 Cir.1942)	8
Rees v. City of Watertown, 86 U.S. 107 (1873)	8
Richardson v. Roberts, 26 Cal. Reptr. 829 (1962)	8
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	8

Miscellaneous:

Boorstin, Daniel J., *The Americans, The National Experience*, Vintage Books, Random House, Inc., 1965 30

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-434

WILLIAM G. MILLIKEN, *et al.*,

Petitioners,

vs.

RONALD G. BRADLEY, *et al.*

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, *et al.*,

Petitioners,

vs.

RONALD G. BRADLEY, *et al.*

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM, *et al.*,

Petitioners,

vs.

RONALD G. BRADLEY, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS KERRY GREEN, ET AL.

QUESTION PRESENTED

The petitioners Milliken having filed their responsive pleading to the Bradley respondents' amended complaint pending in the District Court, should the writs of certiorari be dismissed as improvidently granted and the en-

tire action be remanded to the District Court for trial determination of all fact and law issues presented or, alternatively, should the writs be postponed pending remand to the District Court for trial determination of all fact and law issues presented and appeal permitted directly to this Supreme Court by-passing the Court of Appeals?

STATEMENT OF THE CASE

The Status of Respondents as Defendants-Intervenors in Lower Court Proceedings

Respondents are a number of children attending public schools in the tri-county area of Wayne, Oakland and Macomb counties other than in the City of Detroit, a number of their parents and Tri-County Citizens For Intervention In Federal School Action No. 35257, a Michigan non-profit corporation formed October 26, 1971 for the following purpose:

> "To take all organizational and necessary legal action to intervene representatively as a defendant in Civil Action No. 35257, pending in the United States District Court, Eastern District of Michigan, Southern Division, for and on behalf of all school children and all resident parents who have children of school age in each and every school district in Macomb County, Oakland County and in Wayne County other than the City of Detroit, and in general to do all things in connection therewith and incident thereto not forbidden by the laws of the State of Michigan and with all the powers conferred upon non-profit corporations by the State of Michigan."

On December 2, 1971, respondents filed their intervention motion accompanied by a proposed pleading answering the complaint commencing this action (1a and Ia10) and challenging a July 16, 1971 motion to join additional parties defendant (Ia119) for complete relief to respondents Ronald Bradley, et al. (respondents Bradley) as a misdenominated third-party complaint, said motion to join

85 school districts in said tri-county area having been filed by respondents Denise Magdowski, et al. (respondents Magdowski), several Detroit children and their parents and a Michigan non-profit corporation (Citizens Committee For Better Education formed July 22, 1970 for the purpose of promoting quality education and preserving the neighborhood school as an integral principle of education in Detroit) granted leave to intervene as defendants in March 1971.

Respondents' proposed pleading also stated a counterclaim against respondents Bradley requesting a declaratory judgment that the 85 school districts sought to be joined as defendants by respondents Magdowski were bodies corporate which could sue and be sued and not mere ministerial agents of petitioners William Milliken, et al. (petitioners Milliken), as contended by respondents Bradley, and that respondents Bradley were not entitled to any relief against all or any of the 85 school districts sought to be joined absent proof of state-enforced separation of races among the student populations of one or more of said 85 school districts.

Respondents were granted leave to intervene as defendants on March 15, 1972 (Ia204) subject to the same restrictions as imposed upon the intervening petitioners Allen Park Public Schools, et al., and Grosse Pointe Public School System.

Individually and as a class, the respondent children and parents are the persons upon whom would chiefly fall the burden of a so-called 'metropolitan remedy' to 'desegregate' Detroit public schools as first partially suggested by the District Court in his November 5, 1971 interlocutory order (46a).

The District Court never ruled on the motion to join additional parties defendant (Ia119) and respondents Magdowski withdrew their motion on June 29, 1972, thus ending the first theory of strategy proposed to justify a suggested compulsory transfer and transportation of respondent children to Detroit public schools.

As a tactical matter, respondents have never understood why the various petitioners Allen Park Public Schools, et al., and Grosse Pointe Public School System sought to intervene as defendants in this action instead

of strategically seeking only leave to oppose the Magdowski motion (Ia119) as was sought and granted in *Bradley v. Richmond School Board*, 51 F.R.D. 139, 140 (E.D. Va.1970).

Participation of Respondents in District Court Interlocutory Remedy Proceedings

Respondents submitted a brief in opposition on the question of the propriety of a so-called 'metropolitan remedy' to 'desegregate' Detroit public schools as posed by the District Court (Ia203).

Respondents did not participate in the District Court hearing on intra-city desegregation plans only (IVa1), said hearing having been commenced the day before respondents were granted leave to intervene.

On May 4, 1972, in opposition to the District Court's March 24, 1972 ruling (48a), respondents filed the following objections to testimony and exhibits received by the District Court concerning a so-called 'metropolitan remedy' hearing commenced on March 28, 1972 (IVa142):

> "The defendants-intervenor Kerry Green et al. object to, and move to strike, all the testimony and exhibits offered and received at the hearings on a metropolitan remedy commencing March 28, 1972 for the following reasons:
>
> 1. *Brown v. Board of Education*, 349 US 294 at 300 and 301 is not dispositive of the issue of the propriety of the consideration by this Court of metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to an intra-city desegregation plan pursuant to the Court's "Ruling on Issue of Segregation" (September 27, 1971).
>
> 2. The cradle of equity is the power to afford adequate remedy where the law is impotent; it does not create new rights, but affords a remedy for existing rights. *Berdie v. Kurtz*, 88 F2d 158 at 159 (10 Cir. 1937).
>
> 3. Questions of practice are not to be decided on principles of raw equity which conflict with precedent.

Empire Engineering Corp. v. Mack, 217 NY 85, 111 NE 475 at 478.

4. A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without authority of law. *Meyer v. City of Eufaula, Oklahoma*, 132 F2d 648 at 652 (10 Cir.1942) citing *Rees v. City of Watertown*, 86 US 107 at 122.

5. Absent a trial of the issue of the existence of state-enforced separation of races in the public schools in the suburban school districts in question, the entry of a judgment predicated on metropolitan plans as offered will constitute a denial of due process to the State defendants, the corporate suburban school districts concerned and to the defendants-intervenor.

6. It is always the duty of a court of equity to strike a balance between the needs of the plaintiff and the consequences of giving desired relief. Especially when governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote and speculative. *Eccles v. Peoples Bank*, 333 US 426 at 431.

7. Substance, not semantics, must govern; and a consequence of the metropolitan plans, if implemented as offered, will be either (a) desegregation of the student populations in all or some of the suburban public schools concerned, or (b) integration of the student populations of the Detroit public schools with the student populations in all or some of the suburban public schools concerned, altogether without pleading and proof of state-enforced separation of races in all or any of the suburban public schools concerned, the question of whether or not the corporate suburban school districts are sovereign entities, autonomous bodies or agencies of the State being immaterial.

8. Judicial powers may be exercised only on the basis of a constitutional violation. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 US 1 at 16.

9. The plaintiffs have not shown a right and violation concerning the student populations in all or any of the suburban public schools in question.

Respectfully submitted,

Robert J. Lord

Attorney for Defendants-Intervenor
Kerry Green, et al."

Participation of Respondents in Appellate Proceedings[1]

In July 1972, the Sixth Circuit Court of Appeals granted leave to appeal from four interlocutory District Court orders pursuant to 28 U.S.C. § 1292(b), viz (112a):

---

[1] The December 8, 1972 slip opinion of the Court of Appeals designated respondents as appellees whereas in fact they were appellants. This error was brought to the Clerk's attention by letter to which he responded February 1, 1973:

"Dear Mr. Lord:

This is in reference to your letter of January 22, 1973.

In appeal No. 72-1814 in this court Kerry Green, et al. are designated as Defendants-Intervenors-Appellants. I assume that the reference in your letter is a result of the order of this court issued January 16, 1973, granting the petitions for rehearing in banc in this cause. I am advised by the court that the designation of Kerry Green, et al., as Defendants-Intervenors-Appellees in that order was an inadvertent error.

According to our records the brief and appendix for Appellants, Kerry Green, et al., were filed August 10, 1972. The reply brief for the Appellants, Kerry Green, et al., was filed August 22, 1972.

I hope this will be of assistance to you.

Very truly yours,
JAMES A. HIGGINS, Clerk"

Notwithstanding, the June 12, 1973 opinion (110a) designates the respondents as appellees.

1. Ruling on Issue of Segregation, dated September 27, 1971, reported at 338 F.Supp. 582 (17a),

2. Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972 (48a),

3. Findings of Fact and Conclusions of Law on 'Detroit only' plans of desegregation, dated March 28, 1972 (53a), and

4. Ruling on Desegregation Area and Development of Plan, and Findings of Fact and Conclusions of Law in Support Thereof, dated June 14, 1972 (59a and 97a), and from one order construed to be final, the Order dated July 11, 1972 directing Michigan State officials to purchase 295 school buses (112a), the Court itself having concluded the existence of at least one difficult issue of first impression never before decided (108a).

Unfortunately a fifth interlocutory order (46a) was not also similarly made appealable because the petitioners Milliken were still seeking to overturn dismissal of their improvident appeal from that November 5, 1971 order (*Bradley v. Milliken*, 468 F2d 902, cert. denied, 409 U.S. 844).

Respondents appealed from interlocutory rulings 2, 3 and 4 above, presenting for appellate 28 U.S.C. § 1292(b) review the following issue of first impression never before decided by the Sixth Circuit Court of Appeals or this Supreme Court:

> "Assuming arguendo that the District Court's September 27, 1971 de jure segregation ruling concerning only Detroit public schools will be affirmed, was the District Court's March 24, 1972 metropolitan remedy ruling in error, to-wit, that *Brown II* is dispositive of the legal question of the District Court's raw equity authority to consider judicial enlargement of the public school desegregation area beyond which a *Brown I* constitutional violation was claimed or shown so as ultimately to include not only Detroit public schools but also numerous suburban public schools concerning

which no constitutional violation was ever claimed or shown?''

On appeal, respondents submitted that *Brown v. Board of Education of Topeka,* 349 U.S. 294, 300-301 (1955) (Brown II) was not dispositive of the threshold remedy issue at bar as decided sua sponte by the District Court in his March 24, 1972 ruling (48a), and that the District Court erred in relying upon raw equity power to create sua sponte a 53-school district desegregation area.

In sum and substance, respondents argued that the District Court was erroneously proposing to use the lever of raw equity power to justify a suggested desegregation of numerous public school student populations beyond the city of Detroit without claim or proof of state-enforced separation of races in any public school other than in the Detroit school district.

In short, realistically, the District Court was proposing a so-called 'metropolitan' desegregation area with too much baggage for one vehicle contrary to the admonitions of *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22, 23, 24, 28 (1971) and contrary to authority that equity does not create new rights without authority of law or sit to confer a windfall, the respondents relying upon *Rees v. City of Watertown,* 86 U.S. 107, 122 (1873), *Heine v. Board of Levee Commissioners,* 86 U.S. 655, 658 (1873), *Berdie v. Kurtz,* 88 F2d 158, 159 (10 Cir.1937), *In Re Bowman,* 24 F. Supp. 381, 384 (S.D.Cal.1938), *Meyer v. City of Eufaula, Oklahoma,* 132 F2d 648, 652 (10 Cir.1942), and *Richardson v. Roberts,* 26 Cal. Reptr. 829, 832 (1962).

The Sixth Circuit Court of Appeals, however ambiguously (110a at 177a, 190a and 245a), vacated the District Court's 'equity' ruling (48a), thus ending the second theory judicially proposed to justify a suggested compulsory transfer and transportation of respondent children to Detroit public schools.

The Stillborn Third Theory Proposed to Justify a Suggested Compulsory Transfer and Transportation of Respondent Children to Detroit Public Schools

The third theory proposed to justify a suggested compulsory transfer and transportation of respondent children to Detroit public schools ("Big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law.") was announced sua sponte by the original Sixth Circuit Court of Appeals panel on December 8, 1972 (*Bradley v. Milliken*, slip opinion at page 65 under subtitle: "De Jure Acts of Desegregation" at page 64, December 8, 1972, not reported).

On January 3, 1973, respondents filed the following motions in the District Court: (1) to vacate intervention restrictions (Ia204), (2) entry of a respondent children and parent class defense order, (3) to dismiss the complaint commencing this action (2a and Ia10), except as to the parties defendant who participated in the trial proceedings commencing on April 6, 1971, unless the respondents Bradley filed an amended complaint complying with Rule 19(c), Fed. R. Civ. P., and (4) to vacate the District Court's November 5, 1971 interlocutory order (46a) in part ("It is further ordered that the State defendants submit a metropolitan plan of desegregation within 120 days.").

The District Court (the Honorable Stephen J. Roth having suffered a heart attack on November 7, 1972) did not hear the motions.

Upon the granting by the Court of Appeals of a rehearing en banc on January 16, 1973, the third theory judicially proposed to justify a suggested compulsory transfer and transportation of respondent children to Detroit public schools was self-vacated (110a at 112a) thus ending the short life of a new de facto Equal Protection Clause violation however otherwise its ghost may pervade the June 12, 1973 en banc opinion as noted by Judge Kent in his separate opinion (221a at 224a).

Participation of Respondents in Proceedings Before the District Court Relating Back to the Complaint Commencing this Action and Now Concerning a Fourth Theory Proposed to Justify Compulsory Transfer and Transportation of Respondent Children to Detroit Public Schools

On July 31, 1973, the District Court notified all parties of a conference in chambers on August 15, 1973.

On August 7, 1973, respondents Bradley first probed a short-cut motion materialization of the fourth theory proposed to justify a suggested compulsory transfer and transportation of respondent children to Detroit Public Schools as announced June 12, 1973 by a majority of the Circuit Judges sitting en banc (110a at 174a:

> "If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose."

and at 176a:

> "In *United States v. Texas Education Agency*, 467 F.2d 848, 873 (5th Cir. 1972), the Court said:
>
> > "The discriminatory acts of the school authorities infect the entire school system; they are particularly obvious in the so-called 'pockets'. Some schools may be the 'result' of state-imposed segregation even though no specific discriminatory school board action may be shown as to those schools. Had the school authorities not specifically segregated the minority students in certain schools, other schools may have developed as desegregated facilities. Thus, though they may not be 'pockets of discrimination', these schools are the 'results' of discrimination."

(the Court omitting to quote the concluding paragraph sentences at 873-874: "* * * They must pass the

scrutiny test mandated by *Swann*. See 402 U.S. at 25-26, 91 S.Ct. 1267, 28 L.Ed.2d 554." and omitting also to quote the third sentence thereafter at 874: "• • • Relief from discrimination requires conversion 'to a unitary system'. *Green, supra,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716.")

and at 177a:

"We vacate the order of March 28 (24?), 1972, entitled "Ruling on Propriety of a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of Detroit."

This Court recognizes that, as set forth above, the legislature of the State of Michigan has power to provide a complete remedy for the unconstitutional segregation disclosed in this record. It, too, has responsibility for following the great mandates of the United States Constitution.

If, however, the legislature fails to act, or if it acts in a manner inconsistent with the expeditious and efficient elimination of the unconstitutional practices and conditions described in this opinion, the District Court shall proceed to fashion such a remedy, including an interim remedy if found to be necessary, as it shall determine to be appropriate within the guidelines of this opinion."

and at 188a-189a:

"This opinion heretofore has emphasized that the Legislature of Michigan has an opportunity to determine the organizational and governmental structure of an enlarged desegregation area to remedy the unconstitutional segregation results set forth in this opinion. In the event the Legislature fails to act effectively and expeditiously, the foregoing and other cases cited in this opinion outline the broad scope of equitable relief that may be fashioned by the District Court in this case on remand after all school districts

to be affected are afforded an opportunity to be heard as hereinable provided.")

by jointly filing a separate motion to join numerous additional parties defendant (Ia287) and the following separate motion to require submission of proposals to legislature:

"NOW COME plaintiffs, Ronald Bradley, et al., and move this Honorable Court to require the State defendants, the Governor, the Attorney General, the State Superintendent and the State Board of Education, to take all necessary steps to submit proposals to the legislature of the State of Michigan which would provide a complete remedy for the unconstitutional segregation found by this Court and affirmed by the Court of Appeals.

Such proposals should include, but should not be limited to:

(a) The proposals previously submitted to the Court by the State Superintendent of Education;

(b) Proposal limited to the compulsory exchange of pupils, faculty and resources by contract or otherwise for the purpose of desegregation;

(c) The reorganization, merger, and/or consolidation of school districts;

(d) Any other methods which would provide no less full-time two-way, pupil and faculty desegregation;

(e) Provisions designed to prevent overt and covert evasion of a plan of desegregation and measures designed to effectuate and maintain a stable system of desegregated schools.

Plaintiffs respectfully request that the Court require the defendants to include in their recommendations to the legislature, time tables for the accomplishment of the proposed result consistent with federal constitutional requirements all in accordance with the opinion of the Sixth Circuit Court of Appeals.

> Plaintiffs respectfully move the Court to require submission to it by the State defendants of a progress report within thirty (30) days of the entry of the order and that the Court require the defendants to ask the legislature for a definitive response within sixty (60) days of the order, or such other time as the Court may determine all in accord with the Sixth Circuit directive of 'effectively and expeditiously.' "

supported by the following memorandum of points and authorities:

> "1. *Bradley v. Milliken*, ... F.2d ....., (Nos. 72-1809 – 72-1814, June 12, 1973, *en banc*) Slip. Op. at 71."

On August 15, 1973, respondents filed objections (a) to the motion to join parties unless respondents Bradley first filed an amended complaint and (b) to the motion to require submission of legislative proposals as beyond the authority of the District Court.

The District Court (the Honorable Stephen J. Roth) conferred with counsel of all parties on August 15, 1973, and on that day (a) permitted respondents Bradley until September 6, 1973 to file an amended complaint, and (b) urged petitioner Kelley, as a matter of courtesy, to advise the Michigan Legislature of the June 12, 1973 opinion.

On August 20, 1973, together with a copy of the June 12, 1973 opinion, petitioner Kelley forwarded the following letter to the President of the Michigan Senate and to the Speaker of the Michigan House of Representatives:

> "Gentlemen:
>
> At the request of Federal District Judge Stephen J. Roth, that the Michigan Legislature be advised of the decision of the United States Court of Appeals in *Bradley, et al* v *Milliken, et al*, and that its attention be directed to pages 68, 79 and 80 of the opinion, I enclose herewith a copy of such opinion.
>
> I am forwarding this opinion and information to you because I am aware that presently the Michigan Legislature is adjourned to October 16, 1973, by Joint

Resolution of the Legislature. I ask that you bring this matter to the attention of the members of the Senate and House at your earliest opportunity.

As you know, my office is preparing a petition for writ of certiorari to the United States Supreme Court requesting that it review the decision of the United States Court of Appeals in this case. It should be filed shortly. I am of the opinion that the decision of the Sixth Circuit Court of Appeals is erroneous and will, in the end, not be upheld by the United States Supreme Court.

Sincerely,

FRANK J. KELLEY
Attorney General

Enc.
cc: Hon. Stephen J. Roth
cc: All counsel of record"

On September 4, 1973, respondents Bradley filed their amended complaint (Ia291).

On September 10, 1973, the District Court entered an order joining numerous additional parties defendant (Ia-300) and on October 19, 1973, entered an amending nunc pro tunc order (Ia-302).

On September 20, 1973, respondents filed the following responsive pleading to the amended complaint of respondents Bradley and the following counterclaim for declaratory judgment against respondents Bradley:

ANSWER TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM FOR DECLARATORY RELIEF BY DEFENDANTS-INTERVENORS KERRY GREEN, ET AL.

"Defendants-intervenors Kerry Green, et al., answer plaintiffs' amended complaint to conform to evidence and state their counterclaim for declaratory relief against plaintiffs as follows:

FIRST DEFENSE

This District Court does not sit as a super-legislature to determine the wisdom, need or propriety of state legislation and the plaintiffs have failed to state any claim or establish any fact in this action to justify the entry of any order compelling the State defendants to lobby for any state legislation as requested by the plaintiffs in their August 1973 Motion to Require Submission of Proposals to Legislature.

SECOND DEFENSE

Plaintiffs have failed to state any claim or establish any fact that deliberate state-enforced separation of races exists in any public school in the tri-county area of Wayne, Oakland and Macomb counties beyond the City of Detroit or that any public school in said tri-county area beyond the City of Detroit is being operated by any deliberate state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

THIRD DEFENSE

No child attending any public school in the said tri-county area is a creature of the state and the plaintiffs have failed to state any claim or establish any fact to justify the entry of any order or judgment of the Court encroaching upon, abridging, infringing or violating the fundamental liberty and privacy rights of residence, home, family life, parental child-rearing and attendance at unitary public schools now peaceably and lawfully enjoyed jointly and severally as the case may be by all the individual defendants-intervenors and all other individuals similarly situated in said tri-county area beyond the City of Detroit, said fundamental liberty and privacy rights being retained by the people as provided by the Ninth Amendment and being also within the zones of fundamental liberty and privacy rights guaranteed by the First, Fourth and Fifth Amendments and by

the Due Process Clause of the Fourteenth Amendment.

FOURTH DEFENSE

There exists no constitutional or equitable reason, as mandated by the Equal Protection Clause or the Supreme Court, why the Detroit public schools cannot be made to operate equitably as a unitary Detroit school system, which is to say a school system from which no Detroit school child is effectively excluded by deliberate state action from any Detroit public school because of race, without any additional state-enforced or federal-enforced compulsory transfer or transportation of school children to the Detroit public schools from public schools or places beyond the City of Detroit for any so-called 'limited' remedial purpose as may be claimed by the plaintiffs.

FIFTH DEFENSE

Plaintiffs have failed to state any claim or establish any fact in this action to justify the Court's entry of any order or judgment providing for the compulsory transfer or transportation, or for the compulsory transfer and transportation, of any school child to a public school in the City of Detroit from a public school or a place beyond the City of Detroit for any so-called 'limited' remedial purpose or otherwise; and no constitutional or compelling federal or state interest exists to justify any such judicial compulsory transfer or transportation.

SIXTH DEFENSE

Plaintiffs have failed to state any claim or establish any fact in this action to justify the Court's entry of any order or judgment providing for the desegregation of any public schools other than the public schools within the Detroit school district or enlarging the territorial desegregation area beyond the City of Detroit so as to include public schools in places beyond the City of Detroit.

SEVENTH DEFENSE

Answering the complaint commencing this action, defendants-intervenors incorporate by reference the sixth defense in the pleading accompanying their amended motion to intervene.

EIGHTH DEFENSE

The complaint commencing this action, not amended at any time until September 1973 and then only 'to conform to evidence', failed without any alleged reason therefor, as provided by FRCP Rule 19(a) and (c), to state the names known to plaintiffs of only lately alleged necessary parties defendant who were not joined as necessary defendants in this action when it was commenced in 1970, particularly numerous school districts in the said tri-county area other than the Detroit school district; and said numerous school districts and their various officials are not bound to their prejudice by the Court's September 27, 1971 and March 28, 1972 decisions; nor does FRCP Rule 15(b) apply to necessary parties who were not heretofore joined in this action; nor are those certain school districts which were at their own request granted leave to intervene as defendants on March 15, 1972 bound to their prejudice by said decisions for the reason that said intervention was granted with such restrictions as to render the same legally ineffectual.

NINTH DEFENSE

1. Defendants-intervenors admit the averments contained in paragraphs 2, 4, 5, 6, 7, 8 and 9 of plaintiffs' amended complaint.

2. Defendants-intervenors deny the averments contained in paragraphs 1 and 3, except they admit prior proceedings and decisions in this action as cited in paragraph 1 but without plaintiffs' commentary and that pleadings and some evidence of record in this action have been on file at times in the District Court

and at times available for inspection and/or copying by any interested party.

3. Defendants-intervenors deny all the averments contained in paragraphs 10 through 17, subtitled Additional Allegations to Conform to Evidence, except they admit that certain fact issues have been tried and determined by the District Court and that certain interlocutory fact findings have been affirmed or vacated by the Court of Appeals, and that school districts exist and operate in Michigan pursuant to state laws therefor made and provided, and that many persons located in the City of Detroit are employed and enjoy various services in said tri-county area beyond the City of Detroit, and that many persons located in various places throughout said tri-county area beyond the City of Detroit are employed and enjoy various services in the City of Detroit.

WHEREFORE, the defendants-intervenors deny that the plaintiffs are entitled to all or any of the relief as prayed for by them in their amended complaint but admit that the plaintiffs are entitled to an order or judgment of the Court implementing a desegregation plan whereby the Detroit public schools will be made to operate equitably as a unitary school system, which is to say a school system from which no Detroit school child is effectively excluded by deliberate state action from any Detroit public school because of race, without however any additional intervening judicial enforcement of the compulsory transfer or transportation of any school children to the Detroit public schools from public schools or places beyond the City of Detroit.

COUNTERCLAIM

Defendants-intervenors, assuming that the plaintiffs will agree that the restriction against a counterclaim heretofore imposed on the defendants-intervenors is no longer effective in the interests of the fair play implicit in the Due Process Clauses of the Fifth and Fourteenth Amendments, set forth their counterclaim

for declaratory relief against the plaintiffs pursuant to 28 USC 2201 and 2202 as follows:

1. Defendants-intervenors James, Jack and Kathleen Rosemary, by their Mother and Next Friend, Evelyn G. Rosemary, and James and Evelyn G. Rosemary, parents; Terri Doran, by her Mother and Next Friend, Beverly Doran, and William and Beverly Doran, parents; Edward and Michael Romesburg, by their Father and Next Friend, Edward M. Romesburg, Jr., and Edward M. and Marie Romesburg, Jr., parents; Diann, James and Colleen Blaszak, by their Mother and Next Friend, Martha J. Blaszak, and Raymond J. and Martha J. Blaszak, parents; Diane, Chester and Allan Pruss, by their Father and Next Friend, Ronald Pruss, and Ronald and Hilda Pruss, parents; Tracey and Gregory Arledge, by their Mother and Next Friend, Aileen Arledge, and John and Aileen Arledge, parents; Sheryl and Russell Paul, by their Mother and Next Friend, Mary Lou Paul, and Duane and Mary Lou Paul, parents; Shauna, Scot and Keith Matthews, by their Father and Next Friend, Larry Matthews, and Larry and Nancy Matthews, parents; Deborah, Patricia and Denise Rossman, by their Mother and Next Friend, Maryann Rossman, and Thomas and Maryann Rossman, parents; Tracy Quigley, by her Mother and Next Friend, Janice Quigley, and Daniel and Janice Quigley, parents; Ian, Stephanie, Karl and Jaako Suni, by their Mother and Next Friend, Shirley Suni, and Armas and Shirley Suni, parents; Christopher and Scott Stefanko, by their Mother and Next Friend, Marthanne Stefanko, and Kenneth R. and Marthanne Stefanko, parents; and Susan, Scott and Kristie Ferguson, by their Mother and Next Friend, Sue M. Ferguson, and Samuel F. and Sue M. Ferguson, parents, are all minor children and parents of minor children attending public schools in the tri-county area of Wayne, Oakland and Macomb counties other than public schools in the City of Detroit which is co-terminus with the defendant Detroit school district; and said minor chil-

dren and their parents are all members of two classes of persons so numerous that joinder of all such members in this counterclaim and action is impracticable, to-wit: (1) all minor school children attending public schools in said tri-county area beyond the City of Detroit where they reside, have homes and family life and are reared by their parents, and (2) all parents of minor school children attending public schools in said tri-county area beyond the City of Detroit where they reside, have homes and family life and rear their minor school children; and all the individual defendants-intervenors make this counterclaim pursuant to FRCP Rule 23 on their own behalf and representatively for and on behalf of all persons and members of the said classes similarly situated throughout said tri-county area beyond the City of Detroit; and there are common questions of law and fact affecting the constitutional rights of said minors and parents and the constitutional rights of all persons and members constituting said classes; and a common declaratory judgment is sought and the defendants-intervenors will fairly and adequately protect the interests of said classes; and the claims of the defendants-intervenors are typical of the constitutional claims of said classes.

2. Defendant-intervenor Tri-County Citizens For Intervention In Federal School Action No. 35257 is a Michigan non-profit corporation formed, as shown by Article II of Articles of Incorporation filed with the Michigan Department of Treasury on October 26, 1971, for the following purpose:

> To take all organizational and necessary legal action to intervene representatively as a defendant in Civil Action No. 35257, pending in the United States District Court, Eastern District of Michigan, Southern Division, for and on behalf of all school children and all resident parents who have children of school age in each and every school district in Macomb County, Oakland County and in Wayne County other than the City of De-

troit, and in general to do all things in connection therewith and incident thereto not forbidden by the laws of the State of Michigan and with all the powers conferred upon non-profit corporations by the State of Michigan.

3. The individual plaintiffs represent two classes of persons, to-wit: (1) all school children in the City of Detroit, and (2) all Detroit resident parents who have children of school age; and plaintiff National Association For The Advancement Of Colored People, Detroit Branch, is an unincorporated association, which sues on behalf of its membership who are members of the plaintiff classes.

4. A case of actual constitutional controversy has arisen and exists between the defendants-intervenors and the plaintiffs, to-wit:

(a) the defendants-intervenors say and claim that school children and their parents residing throughout the tri-county area of Wayne, Oakland and Macomb counties beyond the City of Detroit and having homes and family life, including parental child-rearing and attendance at unitary public school systems throughout said tri-county area, peaceably and lawfully enjoy such fundamental liberty and privacy rights as will be encroached upon, abridged, infringed and violated by any state-compelled or federal-compelled transfer or transportation of said school children to the Detroit public schools for any so-called 'limited' remedial purpose of eliminating or balancing the racial identity of Detroit public schools or making the same operate as a unitary Detroit school system or otherwise, the said fundamental liberty and privacy rights of residence, home, family life, parental child-rearing and attendance at unitary public school systems throughout the said tri-county area being retained by the people as provided by the Ninth Amendment and being within the zones of fundamental liberty and privacy rights guaranteed by the First, Fourth and Fifth Amendments and by the Due Process Clause of

the Fourteenth Amendment; whereas to the contrary on information and belief

(b) the plaintiffs say and claim that said school children and their said parents neither have nor enjoy any such said fundamental liberty and privacy rights or, if they do have and enjoy such said fundamental liberty and privacy rights or some of them, the same will not be encroached upon, abridged, infringed or violated by a state-compelled or federal-compelled transfer and transportation of said school children, or a certain number of them selected at random from public schools and places throughout the said tri-county area beyond the City of Detroit, to the Detroit public schools for a so-called 'limited' remedial purpose of eliminating or balancing the racial identity of Detroit public schools or making the same operate as a unitary Detroit school system or otherwise.

WHEREFORE, defendants-intervenors respectfully claim and request an appropriate judgment of the Court declaring the respective and relative constitutional rights of the defendants-intervenors and the plaintiffs, more particularly:

A. That the Court enter an appropriate class action order as requested by the defendants-intervenors.

B. That the Court order a timely hearing of this counterclaim for declaratory relief.

C. That the Court enter a judgment declaring that the individual defendants-intervenors and the classes of persons of which the individual defendants-intervenors are members do jointly and severally have and peaceably and lawfully enjoy fundamental liberty and privacy rights of residence, home, family life, parental child-rearing and attendance at unitary public school systems throughout the said tri-county area beyond the City of Detroit as retained by the people as provided by the Ninth Amendment and within the zones of fundamental liberty and privacy rights guaranteed by the First, Fourth and Fifth Amendments and by

the Due Process Clause of the Fourteenth Amendment.

D. That the Court enter a judgment declaring that the said fundamental liberty and privacy rights will be encroached upon, abridged, infringed and violated by any state-compelled or federal-compelled transfer or transportation of school children to the Detroit public schools from public schools and places in said tri-county area beyond the City of Detroit for a so-called 'limited' remedial purpose of eliminating or balancing the racial identity of Detroit public schools or making the same operate as a unitary Detroit school system or otherwise as may be claimed and requested by the plaintiffs.

E. That the Court grant the defendants-intervenors such other and further relief as the Court may deem appropriate and proper pursuant to 28 USC 2202.

Robert J. Lord

Attorney for Defendants-Intervenors
Kerry Green, et al."

and the following supporting memorandum of law:

MEMORANDUM OF LAW IN SUPPORT OF RESPONSIVE PLEADING BY DEFENDANTS-INTERVENORS KERRY GREEN, ET AL.

"The defendants-intervenors Kerry Green, et al., submit the following memorandum of law in support of their responsive pleading to the plaintiffs' amended complaint to conform to evidence:

The Supreme Court does not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. Mr. Justice Douglas delivering the opinion of the Court in *Griswold v. Connecticut*, 381 U.S. 479, 482.

The child is not the mere creature of the State and the fundamental right of parents to educate their

children as they choose is made applicable to the States by the force of the First and Fourteenth Amendments. *Pierce v. Society of Sisters,* 268 U.S. 510, 535; *Griswold v. Connecticut,* supra, at 482.

School children are "persons" within the meaning of the Bill of Rights and they are possessed of fundamental rights which the State must respect. *Tinker v. Des Moines School District,* 393 U.S. 503, 511; Mr. Justice Douglas dissenting in part in *Wisconsin v. Yoder,* 406 U.S. 205, 243.

Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. *In Re Gault,* 387 U.S. 1, 13.

The makers of the Constitution conferred upon individuals, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. Mr. Justice Brandeis dissenting in *Olmstead v. United States,* 277 U.S. 438, 479.

Without doubt, liberty as guaranteed by the Constitution denotes more than mere freedom from bodily restraint and includes, among other things, the right of the individual to marry, establish a home and bring up children and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men. *Meyer v. Nebraska,* 262 U.S. 390, 399.

Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. *Bolling v. Sharpe,* 347 U.S. 497, 499.

The specific guarantees in the Bill of Rights have penumbral zones of guaranteed liberties and privacies protected as much from governmental invasion as the

specific guarantees. *Griswold v. Connecticut*, supra, 484-486.

The language and history of the Ninth Amendment reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Mr. Justice Goldberg, joined by Mr. Chief Justice Warren and Mr. Justice Brennan, concurring in *Griswold v. Connecticut*, supra, at 488.

Any child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and privacy. Mr. Justice Powell concurring in part and dissenting in part in *Keyes v. School District No. 1, Denver, Colorado*, ... U.S. ..... (slip opinion June 21, 1973, separate opinion of Mr. Justice Powell at page 32).

Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. *Olmstead v. United States*, supra, at 479.

When remedial desegregation orders extend to the transportation of students, the full burden of the affirmative remedial action is borne by children and parents who did not participate in any constitutional violation. *Keyes v. School District No. 1, Denver, Colorado*, supra, separate opinion of Mr. Justice Powell at page 34.

Respectfully submitted,

Robert J. Lord

Attorney for Defendants-Intervenors
Kerry Green, et al."

Respondents Bradley have not yet filed a reply to the respondents' counterclaim against them, perhaps yet relying upon the District Court's March 15, 1972 intervention restrictions (Ia204).

On November 2, 1973, petitioners Milliken filed their responsive pleading (including six affirmative defenses) to the amended complaint of respondents Bradley.

Some 25 other defendants have filed responsive pleadings to the amended complaint; and some 15 motions have been filed concerning said amended complaint.

The Honorable Stephen J. Roth is well and is a trial judge well able to hear and determine to a final decision all fact and law issues which have been and can be presented to the District Court, the respondents Bradley conceding in their memorandum in opposition to petitions for writs of certiorari (Page 3, Footnote 2) that the District Court is not foreclosed from hearing and determining any fact or law issue presented in this action.

The President of the Michigan Senate and the Speaker of the Michigan House of Representatives having overlooked advising Members of the Legislature of petitioner Kelley's August 20, 1973 correspondence, respondent Tri-County Citizens For Intervention In Federal School Action No. 35257 sponsored and on November 1, 1973 presented jointly to said President and Speaker the following petition signed by some 18,000 Michigan citizens:

> "We, the people of the State of Michigan, petition the Legislature to hold public hearings concerning the following rights of Liberty and Privacy guaranteed by the United States Constitution:
>
> First, the rights of all Michigan parents to have their children attend neighborhood schools.
>
> Second, the rights of suburban school children against compulsory transfer or transportation to Detroit public school."

On November 8, 1973, Senator Patrick McCollough together with a majority of other Senators offered the following Senate Concurrent Resolution No. 232:

> "A concurrent resolution creating a special or select committee to hold public hearings to study the

facts, circumstances and implications of Bradley v. Milliken, Federal Civil Action No. 35257, as such civil action may or may not immediately or ultimately involve the Michigan Legislature, and to study the potential impact and the ramifications of cross district busing of school children.

Whereas, On June 12, 1973 in the Detroit school desegregation case known as Bradley v. Milliken, which is Federal Civil Action No. 35257, pending now on remand, before U. S. District Judge Stephen J. Roth, the 6th Circuit Court of Appeals issued an opinion, where the six judges said, page 65: "If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose.", and a page 68: "If, however, the Legislature fails to act, or if it acts in a manner inconsistent with the expeditious and efficient elimination of the unconstitutional practices and conditions described in this opinion, the District Court shall proceed to fashion such a remedy, including an interim remedy if found to be necessary, as it shall determine to be appropriate within the guidelines of this opinion.", and at pages 79-80: "This opinion heretofore has emphasized that the Legislature of Michigan has an opportunity to determine the organizational and governmental structure of an enlarged desegregation area to remedy the unconstitutional segregation results set forth in this opinion. In the event the Legislature fails to act effectively and expeditiously, the foregoing and other cases cited in this opinion outline the broad scope of equitable relief that may be fashioned by the District Court in this case on remand after all school districts to be affected are afforded an opportunity to be heard as hereinabove provided."; and

Whereas, Notwithstanding that no Federal court sits as a super legislature to determine the wisdom, need or propriety of state laws, it appears from aforesaid language that the 6th Circuit Court of Appeals anticipates that the Michigan Legislature will fail to

act as ambiguously indicated and that such a so-called 'failure' will be construed as 'freezing' existing school district boundary lines and that a so-called 'freezing' will be construed as a violation of the equal protection clause of the 14th amendment to the U. S. Constitution, thereby providing an otherwise missing legal theory to justify the compulsory transfer or transportation of numerous suburban school children to Detroit public schools by Federal court order; and

Whereas, A certain petition, to wit,

"We, the people of the State of Michigan, petition the Legislature to hold public hearings concerning the following rights of liberty and privacy guaranteed by the U. S. Constitution:

First, the rights of all Michigan parents to have their children attend neighborhood public schools.

Second, the rights of suburban school children against compulsory transfer or transportation to Detroit public schools",

was signed by some 18,000 persons and presented jointly to the Honorable William J. Ryan and to the Honorable James H. Brickley on November 1, 1973; and

Whereas, The Bill of Rights of the Michigan Constitution of 1963, Article 1, Section 3, not only guarantees the people the right to petition for redress of grievances but also to instruct the representatives; and

Whereas, There appears to exist a certain strategic confrontation involving the Federal Judiciary and the Michigan Legislature, and the Michigan Legislature requires a complete knowledge of the facts, circumstances and implications of said Civil Action No. 35257, and

Whereas, It is incumbent upon the Michigan Legislature to investigate and study the general potential

effects of busing and to determine the attitude of the public on the busing issue to ascertain whether massive busing would produce the results sought by its advocates, or if, indeed, it would lead to a worsening, rather than an improvement, in race relations; now therefore be it

Resolved by the Senate (the House of Representatives concurring), That there is created a special committee of the Legislature, to consist of a maximum of five members from each chamber, Senate members to be appointed by the President of the Senate and members of the House to be appointed by the Speaker, to function during the 1973-74 Regular Sessions of the Legislature, and until December 31, 1974, to study the potential impact and ramifications of cross-district busing of school children, and to report its findings and recommendations to the 1975 Legislature; and be it further

Resolved, That the committee may subpoena witnesses, administer oaths, and examine the books and records of any person, partnership, association, or corporation, public or private, involved in a matter properly before the committee; and may call upon the services and personnel of any agency of the state and its political subdivisions; and may engage such assistance as it deems necessary; and be it further

Resolved, That the committee may employ such consultants, aides, and assistants as it deems necessary to conduct its study; the committee may call upon the Legislative Service Bureau, subject to approval of the Legislative Council, for such services and assistance as it deems necessary and may request information and assistance from state departments and agencies; and be it further

Resolved, That the members of the committee shall serve without compensation, but shall be entitled to actual and necessary travel and other expenses incurred in the performance of official duties, the expenses of the members of the Senate not to exceed $5,000.00

and the expenses of the members of the House to be paid from the appropriations to the House of Representatives.

Pursuant to rule 32, the concurrent resolution was referred to the Committee on Senate Business."

On November 14, 1973, the Committee on Senate Business reported favorably concerning Senate Concurrent Resolution No. 232 and the same was unanimously adopted by the Michigan Senate.

House action concerning Senate Concurrent Resolution No. 232 has not yet been reported out of committee.

ARGUMENT

PETITIONERS MILLIKEN HAVING FILED THEIR RESPONSIVE PLEADING TO THE BRADLEY RESPONDENTS' AMENDED RIGHT AND REMEDY COMPLAINT NOW PENDING FOR TRIAL BEFORE THE DISTRICT COURT, THE RESPONDENTS RESPECTFULLY SUBMIT THAT THE WRITS OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED AND THAT THE ENTIRE ACTION BE REMANDED TO THE DISTRICT COURT FOR TRIAL DETERMINATION OF ALL JUSTICIABLE FACT AND LAW ISSUES PRESENTED OR, ALTERNATIVELY, THAT THE WRITS BE POSTPONED PENDING REMAND OF THE ENTIRE ACTION FOR TRIAL DETERMINATION OF ALL JUSTICIABLE FACT AND LAW ISSUES PRESENTED AND A DIRECT APPEAL PERMITTED TO THIS SUPREME COURT BY-PASSING THE SIXTH CIRCUIT COURT OF APPEALS.

To borrow from historian Daniel Boorstin (*The Americans, The National Experience*, Vintage Books, 1965, p. 221), the alternative suggestion of a so-called 'metropolitan remedy' to 'desegregate' the student populations of all Detroit public schools was born (46a, the District Court's November 5, 1971 order) without ever having been conceived, and the only continuing resource of the four piecemeal theories proposed to justify the suggested compulsory

transfer and transportation of respondent children to Detroit public schools has been vagueness.

The first 'Rule 19(a)(1)' theory proposed on July 16, 1971 (Ia119) never materialized, the improvident intervention of assorted petitioner school districts merely confusing and prolonging proceedings.

The second 'equity' theory (48a, the District Court's March 24, 1972 ruling) will remain vacated until this Court revolutionizes the remedial import of *Brown II*.

The 40-day existence of the third 'big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection of the law' theory was hopelessly untenable.

Before the District Court now, respondents Bradley have embraced the fourth 'legislative-if' theory, it already appearing to respondents however that there is not the slightest likelihood that the District Court will grant the Bradley respondents' motion to require submission of proposals to legislature and that prudence will dictate that they forego even so much as noticing that motion for hearing.

Ironically, until recently filing their respective motions and pleadings in the District Court, neither the respondents Bradley nor the petitioners Milliken contributed anything to the first impression remedy question now again at bar for trial in the District Court, and the respondent children and parents have relied and will rely upon themselves and not at all upon their litigant public officials.

The only order (106a, the District Court July 11, 1972 order for acquisition of transportation) construed by the Court of Appeals to be a final order (112a) has been vacated, and the District Court's September 27, 1971 (17a) and March 28, 1972 (53a) ruling affirmed on 28 U.S.C. § 1292(b) appeal are still interlocutory.

At page 3, footnote 2, of the Bradley respondents' memorandum in opposition to petitions for writs of certiorari, they fairly concede that the District Court may, can and should hear and determine constitutional violation as well as remedial questions as presented in trial proceedings now pending before the District Court.

Nothing inhibits or prohibits the District Court from entertaining, hearing and determining any justiciable fact

or law issue presented by the petitioners, the respondents, or the numerous defendants recently joined.

Nor, more particularly, does anything inhibit or prohibit the District Court from applying correct equitable standards of converting all or any remaining part of a Detroit dual school system to a unitary system, which is to say a public school system from which no child is effectively excluded because of race or color, as defined by this Court in *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 21 (1969).

The petitioners Milliken might well have heeded Robert Frost's admonition that the only way around a thing is through it and long ago voluntarily submitted to the District Court, for moral if not other reasons, a plan for converting any remaining dual Detroit public school to a public school from which no child is effectively excluded because of race or color; and respondents have not and will not share in or support circuitous litigation by the petitioners for themselves in their own behalf and not at all for or on behalf of the respondent children and parents.

The Bradley respondents' September 4, 1973 amended complaint (Ia291), both in substantive import and by court rule (Rule 15(c), Fed. R. Civ. P.), relates back to the date of the complaint commencing this action (1a and Ia10).

Respondents may disagree with the District Court but they have not the slightest apprehension that the District Court (the Honorable Shephen J. Roth) will fail fairly and truly to hear and determine their pleaded affirmative defenses and counterclaim for declaratory judgment; and if respondents Bradley would acknowledge that the March 15, 1972 intervention restrictions (Ia204) are inoperative and kindly file their reply to respondents' counterclaim, the fourth theory vaguely proposed contingently to justify a suggested transfer and transportation of respondent children to Detroit public schools could be laid to rest and the wholly unnecessary traumatization of public emotions concerning this case be ended.

CONCLUSION

Wherefore, respondents submit that the state of this case and the economy of appellate judicial energies weigh all in favor of remand to the District Court for trial determination of all fact and law issues presented; and because of valuable time already lost, this Court may want to consider permission of direct appeal by-passing the Court of Appeals.

Respectfully submitted,

ROBERT J. LORD
Attorney for Respondents
Kerry Green, et al.
8388 Dixie Highway
Fair Haven, Michigan 48023